Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-293
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the	)	
Commission's Rules With Regard to	)	MM Docket No. 94-131
Filing Procedures in the Multipoint	)	
Distribution Service and in the	)	
Instructional Television Fixed Service	)	
	)	
and	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act - Competitive Bidding	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 10, 1994 Released: December 1, 1994

Comments Due: January 9, 1995
Reply Comments Due: January 24, 1995

By the Commission:

I. INTRODUCTION

1. By this action, the Commission proposes to streamline the procedures by which applications for new facilities in the Multipoint Distribution Service (MDS)[1] are filed and processed. We propose to adopt filing procedures consistent with our competitive bidding procedures. To do this, we propose that applicants file short-form applications for predetermined geographic areas and the successful bidders file long-form applications. We believe that implementation of this process would avoid the lengthy delay associated with licensing stations site-by-site, and therefore would allow operators to enhance their service more rapidly, providing more competition to wired cable. However, we also invite comment on alternative filing procedures, including a national filing window and one limited to existing licensees and system operators. We solicit comment on the technical and practical feasibility of utilizing a mandatory electronic filing approach in conjunction with each of

[1] In this proceeding, unless otherwise indicated, "MDS" includes single channel and multichannel applications and authorizations collectively.

these filing approaches.[2] Finally, we invite any other proposals that would allow the Commission to process MDS applications for new stations more efficiently and result in more MDS service opportunities becoming available to the public. We limit the scope of this proceeding to revisions to our rules and procedures that will improve the MDS application processes.[3]

2. Our goal in instituting this proceeding is to facilitate development of the wireless cable industry[4] and to continue our efforts to coordinate the processing of MDS and ITFS applications. The Commission has consistently maintained that, in providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth. An essential component of competition is choice. As we recognized in our recent report to Congress, consumers in the market for video programming do not have enough choices.[5] Although competing technologies have made major strides since the previous report on cable competition in 1990, the cable television market remains largely noncompetitive. With respect to wireless cable, we reported that more systems are being built, the number of subscribers has increased, and program access provisions and changes in other regulations have given wireless cable operators a better foothold in competition with wired cable, including the credibility to gain access to financing. *Competition Report* at paras. 79, 80 and 90. However, the difficulty of

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[2] There is now outstanding an *Order and Further Notice of Proposed Rulemaking* in MM Docket No. 93-24, 9 FCC Rcd 3348 (1994), in which the Commission is considering further improvements to the Instructional Television Fixed Service (ITFS) licensing process, including adoption of a window filing procedure. The only aspect of this proceeding which we propose to apply to ITFS is the electronic filing proposal.

[3] As noted in footnote 2, *supra*, the electronic filing proposal if implemented would also apply to the ITFS application proceeding. In response to a July 28, 1993 *Public Notice*, we received several comments on ways the Commission could expedite the processing of MDS applications. We have considered those views in our drafting of this *Notice of Proposed Rulemaking* and we will incorporate those materials in the public record of this proceeding.

[4] "Wireless cable" is the delivery of video programming to subscribers using MDS and/or ITFS channels. Wireless cable resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels. Our use of the term "wireless cable" does not imply that it constitutes cable television for statutory or regulatory purposes.

[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (*Competition Report*), CS Docket No. 94-48, FCC 94-235 (released Sept. 28, 1994). The Commission is required to file such annual reports pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, Section 628(g), 106 Stat. 1460 (amending the Communications Act of 1934), codified at 47 U.S.C. Section 548(g).

accumulating sufficient channel capacity remains a major obstacle to many wireless cable operators. According to the *Competition Report*, the combination of administrative improvements in wireless cable licensing and the use of digital compression[6] should help to alleviate this problem in the future. *Id.* at para. 90. This rulemaking is one of several administrative improvements directed toward enhancing the development of wireless cable operators as viable competitors in the video programming marketplace. It will also further the policies set forth by Congress in the 1992 Cable Act to ". . . promote the availability to the public of a diversity of views and information through cable television and other video distribution media."[7]

II. BACKGROUND

3. When the Commission reallocated eight channels to MDS in 1983, thereby creating wireless cable as a multichannel video distribution medium, a variety of application procedures existed because wireless cable system operators used a combination of channels accumulated from a variety of Commission services with differing sets of rules, procedures and policies.[8] One of the major obstacles faced by wireless cable operators over the years has been the difficulty involved in accumulating the number of channels necessary to meet subscriber demand and be able to compete with wired cable television systems in the same

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[6] Digital compression is a technology that employs various techniques to reduce the number of bits required to transmit a program. Therefore, for a given channel bandwidth and digital transmission rate, an operator may, depending on circumstances, transmit a single uncompressed program or multiple compressed programs. For example, a six-to-one compression ratio permits the operator to offer six program channels from one 6 MHz frequency bandwidth.

[7] 1992 Cable Act Section 2(b)(1), 106 Stat. at 1463. An essential element of the 1992 Cable Act is promoting increased competition and diversity by fostering the development of alternative multichannel video programming distributors (MVPD). The term "MVPD" means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." Communications Act Section 602(12), 47 U.S.C. Section 522(12). In markets where effective competition is present, the government will no longer need to regulate cable rates, as required by the 1992 Cable Act, because cable rates will be regulated by the marketplace. Communications Act Section 623(a)(2), 47 U.S.C. Section 543(a)(2).

[8] *Report and Order* in Gen. Docket No. 80-112, 94 FCC 2d 1203 (1983). Therein, the Commission reallocated eight of the ITFS channels for use by MDS nationally, grandfathered interference protection to existing E or F ITFS applicants, permittees or licensees, approved cash payments by MDS entities for vacating ITFS channels, and authorized ITFS licensees to lease the excess capacity on their systems to wireless cable operators.

area. There are a maximum of thirty-three microwave channels available for wireless cable systems. This includes thirteen MDS channels (Channels 1, 2 or 2A, E1-E4, F1-F4 and H1-H3) and the excess capacity in the twenty ITFS channels (Channels A1-A4, B1-B4, C1-C4, D1-D4 and G1-G4).[9] In an effort to consolidate and promote the expeditious processing of applications for licenses that may be used to provide wireless cable services into one organization, the Commission recently transferred responsibility for MDS from the Common Carrier Bureau to the Mass Media Bureau. *Amendment of Parts 0 and 1 of the Commission's Rules to Reflect a Reorganization of Multipoint and Multichannel Multipoint Distribution Services*, 9 FCC Rcd 3661 (1994).

4. For a number of years, the Commission has been concerned that the volume of MDS applications filed by speculators has caused delays in the licensing process and has overburdened the Commission's limited resources. A rule revision aimed at addressing this problem was adopted in the *Report and Order* in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410, 6424 (1990); *Order on Reconsideration*, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991), *petition for review filed, United States Independent Microwave Television Association v. FCC and United States of America*, No. 91-1637 (D.C. Cir. filed Dec. 20, 1991) (held in abeyance by Court Order of February 21, 1992, pending action on the second set of reconsideration petitions). The rule, commonly referred to as the "same calendar day rule" is found in Section 21.914 of the Commission's rules, 47 C.F.R. Section 21.914. Under this rule, an MDS application for a new station that is acceptable for filing will be mutually exclusive with any other MDS application which is acceptable for filing for the same service area and frequency if it is received by the Commission on the same calendar day as the first such MDS application received by the Commission. This rule change eliminated the opportunity for speculators simply to copy applications that were previously filed and resubmit them under different names. However, because of our rules authorizing lotteries and settlement groups, the filing of applications for new MDS stations was nevertheless appealing to speculators, who continued to file a large number of applications up to the time the Commission imposed a freeze on the filing of applications for new facilities in

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[9] In some locales, there are twenty-eight ITFS channels due to the 1983 grandfathering of ITFS entities. In 1991, the Commission reallocated the H-group channels from the Operational Fixed Service to MDS and made MDS operators eligible for authorization on vacant ITFS channels with specified restrictions. *Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6793-94, 6801-06 (1991). In 1992, the frequency spectrum of 2160 MHz to 2162 MHz (of the former frequency allocation of 2156 MHz to 2162 MHz, MDS Channel 2) was reallocated to emerging technologies, leaving MDS Channel 2A, a 4 MHz channel. *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, 7 FCC Rcd 6886, 6889 n.22 (1992).

the *Notice of Proposed Rulemaking*, PR Docket No. 92-80, 7 FCC Rcd 3266 (1992).[10] At the time of the freeze, there was a backlog of tens of thousands of applications, the majority believed to be speculative. *Id.* at 3267.

5. The Commission has recently stated that all mutually exclusive MDS applications for new stations filed after the lifting of the freeze will be subject to the competitive bidding process. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2359 (1994) (*Second Report and Order*), *recon. granted in part, Second Memorandum Opinion and Order*, FCC No. 94-215 (released Aug. 15, 1994), 59 Fed. Reg. 44,272 (Aug. 26, 1994). Therein, the Commission determined that the use of competitive bidding for MDS would further the objectives described in 47 U.S.C. Section 309(j)(3). The use of competitive bidding would speed the development and further deployment of MDS for the benefit of the public, with minimal administrative or judicial delays. The proposals set forth for consideration in this proceeding are designed to avoid the backlogged applications and legal protests that have delayed and stifled the deployment of MDS in the past. We believe that accelerated processing permitted by electronic filing and data collection, along with competitive bidding procedures, will reduce the likelihood of speculative filings and generally expedite the initiation of new service.

III. DISCUSSION

6. In the discussion that follows, we invite comment on several alternatives for acceptance of MDS applications after the processing freeze is lifted next year. The Commission favors a filing approach which is based upon specific predetermined geographic areas, such as Metropolitan Statistical Areas (MSA) and Rural Service Areas (RSA) or Areas of Dominant Influence (ADI). This filing approach would utilize short-form applications to identify mutually exclusive applicants for competitive bidding purposes. *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2376 (1994). Another filing approach would restrict applications to Commission-identified vacant E, F and H channels. Here, the Commission would also identify mutually exclusive situations through the use of short-form applications. Under another alternative, the Commission would periodically open national filing windows, and there would be no geographic restrictions on filing for available MDS channels. One option to the national filing window approach would be to limit eligibility to file in the first window to existing system operators and licensees. These two national window proposals would require long-form applications, containing the applicant's complete technical proposal, to determine mutual exclusivity before competitive bidding procedures are implemented.

7. ***MSA/RSA/ADI Approach.*** As our preferred filing approach, we invite comment

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[10] The Commission adopted a number of rule changes to deter systematic abuse by speculators in *Report and Order* in PR Docket No. 92-80, 8 FCC Rcd 1444 (1993).

on whether we should adopt a procedure under which applications for new MDS stations would be filed for predetermined, discrete areas, similar to Cellular Radio's Metropolitan Statistical Areas (MSA) and Rural Service Areas (RSA), or the television Areas of Dominant Influence (ADI).[11] The Commission would release a public notice announcing auctions by MSA/RSA/ADI, and the time, place and method of competitive bidding to be used, including the applicable bidding procedures. Applicants would file for all usable E, F and H channels. They would be allowed to operate facilities on these channels anywhere throughout the service area provided the specific engineering design of their wireless cable facility meets the Commission's interference protection standards to any previously proposed or authorized MDS facilities. The public notice would also specify the filing period for short-form applications (FCC Form 175)[12] and deadlines for submitting the applicable filing fee and the upfront payment, and the amounts. Applicants would file a short-form application for all usable channels in a particular MSA, RSA or ADI and those applications would be treated as mutually exclusive and subject to the competitive bidding process. Mutually exclusive applicants would bid for all usable channels in a particular area as a package, enabling operators to amass large channel groups.

8. We seek comment on whether our current 15 mile radius definition of an MDS licensee's protected service area would be appropriate for licenses granted on an MSA/RSA/ADI basis. In particular, we request comment on whether the MSA/RSA/ADI boundary should become the protected service area of the wireless cable system. If this definition of protected service area were adopted, how would our current interference protection standards, defined by desired-to-undesired signal strength ratios, be applied? Would these standards permit service to the areas adjacent to the borders between geographic license areas? If not, are there modifications to the rules that might serve the public interest, for example, permitting parties to negotiate interference rights to enable interference-free service in the border areas? We also request comment on the impact of our protected service

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[11] MSAs and RSAs are standard geographic areas used by the Commission for administrative convenience in the licensing of cellular radio systems. All of the 306 MSAs and 428 RSAs and the counties they comprise are listed in *Public Notice* Report No. CL-92-40 "Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties," DA 92-109, 7 FCC Rcd 742 (1992). *See also* 47 C.F.R. Section 22.909 (effective Jan. 1, 1995). ADIs are standard geographic areas developed by Arbitron Ratings Company. Under this market definition, each county in the continental United States is placed within one of 210 ADIs, the lowest numbered ADI having the highest population.

[12] Form 175 contains the applicant's name, the licenses on which the applicant wishes to bid, the persons authorized to make or withdraw a bid, whether the applicant is qualified as a designated entity under 47 C.F.R. Section 1.2110, certifications that the applicant is legally, technically, financially and otherwise qualified, and identification of all parties involved in agreements, or certification that no agreements exist, relating to the conditional licenses being auctioned or the bidding process.

area decision on the ordering in which service areas should be auctioned. For example, depending on the definition of protected service areas, service areas auctioned earlier may be able to secure border area interference protection rights. In this case, should service areas be auctioned in descending order of population?

9. The auction winner would have several responsibilities and rights. For instance, an auction winner would be required to submit a down payment within five business days after the close of the auction. The auction winner would be required, by a specified date, to file a long-form MDS application which includes a complete engineering proposal. This long-form would include a demonstration that the proposed MDS stations would not cause harmful interference to any previously proposed or authorized MDS stations, and applicants would have the opportunity to cure any such defects in their engineering. Long-form applications found to be acceptable would be proposed for grant by a Commission public notice. This public notice would trigger a thirty-day period for the filing of petitions to deny. *See* 47 U.S.C. Section 309(b). If there are no petitions filed, or upon resolution of petitions that have been filed, and if the applicant is otherwise qualified under 47 C.F.R. Section 21.32 (*e.g.*, FAA clearance), the conditional license would be granted. If the conditional license was granted following an auction, the grant would be conditioned upon the winner making full payment of the balance of the winning bid within five business days following the grant (except for small businesses allowed to make installment payments).[13] Since applicants would receive conditional licenses for all usable channels in a particular area as a package, we seek comment as to the appropriateness of allowing mergers and other transfers prior to the completion of construction.

10. The Commission believes that this framework provides the most manageable and efficient system to disseminate MDS licenses. The use of short-form applications prior to the auction reduces the administrative burdens on applicants and the Commission, and minimizes the potential for delay. In addition, this type of filing approach, coupled with competitive bidding procedures, would encourage universal coverage and afford the greatest likelihood of rapidly promoting the development of MDS as a viable competitive service. This approach is also likely to deter speculation because auction methodologies are designed to ensure that the party who most highly values the spectrum obtains the license, not a speculator. We solicit comment on whether we should adopt this proposal, and if so, which geographic areas are most suitable for MDS to utilize.

11. ***E, F and H Identified Sites.*** An alternative filing approach, which is somewhat more restrictive than our preferred approach, would limit applications to predetermined sites. We invite comment on a procedure pursuant to which multiple public notices would identify sites where there are vacant E, F or H channels available. The Commission would identify such sites based upon the location of an already authorized E, F or H channel. Pursuant to this proposal, applicants for the vacant channels at these identified sites would file a short-

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[13] The definition of "small business" is discussed in paragraph 24, *infra*.

form application to identify mutually exclusive situations for purposes of competitive bidding. Thereafter, the auction winner would be required to file a long-form MDS application which contains a complete engineering proposal, specifying compatible station design and demonstrating a lack of harmful interference to co-channel and adjacent-channel previously proposed or authorized MDS stations in nearby areas. We request comment on this alternative, which also promotes streamlined application processing and works well with competitive bidding procedures.

12. ***National Filing Window Proposal.*** Under this proposal, windows would be opened periodically in order to provide opportunities for filing applications for new MDS stations.[14] The Commission would issue a public notice announcing the filing window for available channels which would remain open for a specified period of time, and applications for new MDS stations would be filed within that stated window. Under this approach, there would be no geographic restrictions upon filing for available MDS channels. Accordingly, the applicant would initially be required to file a long-form MDS application, with the applicant's complete engineering proposal, to enable the Commission to determine mutual exclusivity. After the close of the window, each application would undergo an acceptability review, which includes an engineering interference analysis. To be acceptable for filing, the application would have to contain all of the data and other information necessary to allow processing of the application. *See* Appendix A, Items 1-20. An application would be considered unacceptable for filing and returned if, *inter alia*, its proposed facilities are predicted to cause harmful interference to any part of the protected service area of an authorized station or a facility proposed in an application filed prior to the opening of a particular filing window. *See* 47 C.F.R. Sections 21.31, 21.902 and 21.914. Applications found to be acceptable and not mutually exclusive with any other acceptable application would be proposed for grant by a Commission public notice. This public notice would trigger a thirty-day period for the filing of petitions to deny. *See* 47 U.S.C. Section 309(b). If there are no petitions filed and if the applicant is otherwise qualified, the conditional license would be granted. Applications found acceptable for filing and mutually exclusive with another would be subject to competitive bidding. Under the national window approach, applications may be amended while the window is open. After the close of the window and up until the close of the auction, no amendment may be filed which corrects any defect in an application that is unacceptable for filing on the last day of a filing window. We propose that the Commission only accept the following two types of amendments after the close of the window and up until the close of the auction: (1) amendments filed pursuant to 47 C.F.R. Section 1.65 to furnish updated information, and (2) minor amendments as defined by 47 C.F.R. Section 21.23, including *pro forma* changes in ownership or control. Following the auction, the Commission would provide the auction winner the opportunity to cure any defects in its engineering proposal.

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[14] A similar procedure is currently being used by the low power television service. *Report and Order* in MM Docket No. 83-1350, 102 FCC 2d 295 (1984).

13. We believe that since this approach would likely result in a larger number of mutually exclusive applications, implementation would require significant resources and take a substantial amount of time to conduct the competitive bidding process. We request comment on how to resolve the "daisy-chains" (interlinking application proposals at different locations) that might arise under this proposal. We invite commenters favoring a national window approach to discuss these concerns, how far in advance we should announce the opening of a window and the appropriate length of the window.

14. ***First Window: Accumulation of "Critical Mass" of Channels.*** As an option to the national filing window, the first window could be limited to existing system operators and licensees. Under this approach, we would require that applications be filed by a licensee or system operator who, at the time the application is filed, is operating a minimum number of channels, such as four, six, eight or ten. Where the existing system operator is not a licensee, we would require a certification that lease agreements have been executed between the operator and the licensee. We would require such applicants to keep copies of lease agreements and make them available upon the request of the Commission. This "critical mass" approach would encourage enhancement of existing wireless cable operations, and thus accelerate opportunities for competition with wired cable systems in various locales. Such an approach is well within our legal authority. *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 n.9 (1945); *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989). We solicit comment on whether we should adopt this proposal, and if so, who should be eligible to file applications in this window.

15. ***Interference Criteria and Mutual Exclusivity.*** As a complement to the various filing proposals and electronic procedures, *infra*, we propose to adopt a technical equation as the basis for the "free space" interference protection calculations. The following formula is currently used by the Commission's MDS engineers and is recognized by engineering consulting firms that represent the wireless cable industry:

> The received signal power level $(RSL)_{dBW}$ at the output of the FCC reference receiving antenna is obtained from the following: [15]
>
> $$(RSL)_{dBW} = (EIRP)_{dBW} - (L_{FS})_{dB} + (G_{AR})_{dB}$$
>
> where the free space loss $(L_{FS})_{dB}$ is
>
> $$(L_{FS})_{dB} = 20 \log (4\pi d/\lambda) \text{ dB}$$

In these equations, $(RSL)_{dBW}$ is received power in decibels referenced to one watt, $(EIRP)_{dBW}$

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[15] Leon W. Couch II, Digital and Analog Communication Systems, p. 384 (3rd ed. 1990).

is equivalent isotropically radiated power in decibels above one watt, d is the distance of the signal path in meters, λ is the wavelength of the signal in meters, and G_{AR} is the gain of the reference receiving antenna, as obtained in 47 C.F.R. Section 21.902(f)(3), Figure 1. We propose to formalize the above equations by adopting them as a rule provision, much like the equation at 47 C.F.R. Section 21.902(d)(2). In so doing, we are not proposing significant changes in the substantive requirements regarding interference showings. To facilitate our plans for computerized interference studies, we will require proposed facilities to meet the 45 dB and 0 dB co-channel and adjacent-channel desired to undesired signal strength ratios at points along the service contours of protected facilities which were authorized under the current interference standards. With regard to long-form applications, we propose to retain the rules requiring that the applicant perform analyses of the potential for harmful interference and serve the interference studies upon the previously proposed or authorized station applicants, conditional licensees or licensees required to be studied. 47 C.F.R. Section 21.902. On the electronic application form, the applicant would supply certain crucial data elements describing the station parameters, such as antenna polarization and the station equivalent isotropically radiated power (EIRP), while the Commission staff would perform the interference analysis using a computer program. In this service, there are two rules that currently define mutual exclusivity: Section 21.31 and Section 21.901(d)(5). *See* 47 C.F.R. Section 21.902. In light of the proposed computer-assisted interference studies that will readily determine whether an application is mutually exclusive with another, under our national window proposals, the second rule, Section 21.901(d)(5), is no longer necessary. We would not require the submission of any types of interference or other engineering analyses to the Commission at the time the application is filed. Nor would we require the submission of a list of each applicant, conditional licensee or licensee served at the time the application is filed. We propose to require the applicant to make the records available for Commission inspection upon request. We invite comment on whether we should adopt this formula as a rule. We also seek comment on whether we should eliminate signal contour maps as a required part of interference studies.

16. We are also proposing to improve the current application form used for new MDS stations, FCC Form 494,[16] by excluding certain data elements which have yielded information that is no longer necessary or of only marginal utility. Further, such modifications should serve to facilitate the proposed computer-assisted process. For instance, we propose to eliminate queries regarding the antenna vertical sketch and the narrative description of why grant of the application would be in the public interest. We also generally propose to exclude the following parameters of the transmission system: transmitter manufacturer and model number, transmitter output power, transmitting antenna gain and the specification of transmission line and other transmission losses. With regard to transmitters, we are only concerned that MDS licensees operate transmitters that are "type-accepted" by the Commission for use in this service. Although we propose to eliminate the requirement

[16] Since Form 494 is a multi-purpose form that is used for other services, to the extent that we are proposing changes, we intend to create a different form to be used for MDS.

that the applicant identify the transmitter make and model, we intend to require conditional licensees to certify the use of a type-accepted transmitter in their certification of construction, currently FCC Form 494A. Transmitter output power, system loss, and antenna gain are the parameters used to calculate a station's maximum EIRP. The MDS rules were recently changed to provide for a maximum EIRP, rather than a maximum value for transmitter output power. *See* 47 C.F.R. Section 21.904. The critical parameter in free space signal propagation analysis is EIRP. Applicants, therefore, would be permitted to use any transmitter output power necessary to achieve the desired EIRP, provided the EIRP remained within the limits given in the Commission's rules. Thus, we believe that it is not necessary to require applicants to specify the equipment parameters used to calculate the EIRP, *i.e.*, transmitter power, antenna gain and transmission losses. We also propose to allow changes to these transmission parameters without notification to the Commission, provided the resulting EIRP would not change. The station power to be specified on the form would be the maximum EIRP in the horizontal plane, *i.e.*, the EIRP at an angle of zero degrees in the vertical plane. Electrical beam tilting of antennas will be permitted; however, in all cases, applicants would be required to specify the EIRP in the horizontal plane. In most instances, this value of EIRP closely approximates the power radiated to the radio horizon which is most relevant to interference analysis. Also, by proceeding in this manner, it would not be necessary for us to collect data on antenna vertical radiation patterns. We invite commenters to discuss these and other possible changes to an application form for MDS facilities and the related issues introduced in this proceeding.

17. ***An Electronic Application Form.*** We propose to modify further the long-form MDS application in an effort to make the form compatible with an electronic filing system. The proposed electronic version of the long-form application for new MDS stations would consolidate information from FCC Form 494 and FCC Form 430, the License Qualification Report, and be formatted in a manner appropriate for electronic data capture. For example, we would retain engineering data elements necessary for analysis of interference or possible air safety hazards, and we would retain applicant responses which demonstrate compliance with a particular statutory requirement, such as an environmental assessment. In terms of specific items, Appendix A lists proposed data elements and other informational items for our new electronic application form. These include general, engineering and legal elements. The engineering parameters of proposed stations are generally limited to variables used in our interference analysis or air safety determinations, such as transmitting antenna site coordinates, EIRP, antenna polarization, site elevation and antenna structure height above ground. Other data may be used to verify an applicant's compliance with a particular Commission rule. For example, antenna beam width is used to calculate the maximum allowable EIRP of a station using a directional transmitting antenna. Applicants proposing to locate stations in areas where notification or coordination with Canada or Mexico is required by international agreement would be required to submit the following additional technical data, which is not proposed as standard data elements in the electronic application form: transmitter output power, transmitting antenna gain and transmission line loss. It may be possible to specify this data in a textual exhibit in the electronic long-form application. If not, a paper supplement to the application would be submitted as directed by the

Commission staff. We seek comment on our proposed elements for the electronic filing process.

18. ***Electronic Filing Process.*** In 1992, Congress amended the Communications Act of 1934 to permit the electronic filing of license and construction permit applications. Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, Section 204, 106 Stat. 3533, 3543, codified at 47 U.S.C. Sections 308(b) and 319(a). Such applications may be signed "in any manner or form, including by electronic means, as the Commission may prescribe by regulation." *Id.* The Commission currently accepts license applications electronically in the private land mobile radio service (FCC Form 574) and we are here considering a proposal to accept electronically applications for new MDS stations.[17] We would modify our handwritten signature requirement, 47 C.F.R. Sections 1.743 and 21.6(d), and other rules as necessary to implement such an electronic filing system.

19. We envision the use of communication links, such as a Value Added Network (VAN), that would allow the exchange of data between applicants and the Commission. VANs are offered by private entities and may require an applicant to establish an account. The use of a VAN is particularly attractive as a method of electronically filing applications because of its high degree of efficiency and security in transferring information. Although our intent is to implement an electronic filing system without creating additional burdens, we recognize that VANs may impose an added cost to filing an application. For example, to establish an electronic mailbox from a VAN may cost as much as $300 with added monthly and per use fees. To minimize the costs to individuals, an electronic mailbox could be established by a representative group, such as a law firm or engineering consulting firm, as a service to its customers.

20. In designing an electronic filing system that will work efficiently, we believe that it will be necessary to eliminate the filing of paper to the maximum extent possible. Such a system would consist of data on a series of computer screens, translated into a transaction format, together with electronically prepared exhibits. We envision an electronic form designed for personal computers using a windows-based environment. Essentially, the data would be uploaded from a personal computer to a VAN or other type of electronic mailbox, then downloaded to a Commission mailbox in the correct format. Although it appears that VANs may have the capability to transfer text electronically, a possible limitation concerns

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[17] *Amendment of the Commission's Rules to Modify Signature Requirement for License Applications in the Private Radio Services*, 8 FCC Rcd 2662 (1993). Until we have gained some experience with electronic filing procedures, we propose to limit its use to the filing of applications and related amendments for new MDS stations. Certifications of completion of construction, applications for assignment or transfer of control of licenses, license renewals, signal boosters, extensions and modifications pursuant to 47 C.F.R. Sections 21.40, 21.41, 21.42 and 21.910, would continue to be filed in paper format according to existing procedures.

the difficulty or expense associated with electronic maps or other graphic representations. For routine applications, we hope to eliminate the need for paper submissions completely, at least during the initial application acceptance stage of processing. Implementing such a system would expedite the application process in several ways. First and foremost, it would eliminate the need for manual entry of application data into the Commission's several databases, resulting in instant databases that are current and accurate. Our intent is for the public to have on-line viewing access to MDS databases through a third-party vendor and the Commission's public reference room. Second, an electronic filing system, coupled with the proposed computer-assisted processing program, would eliminate the need for manual review by the Commission's engineering staff of engineering analyses currently submitted by applicants under 47 C.F.R. Sections 21.902 and 21.904. This manual review is very time-consuming. Finally, the staff would be able to handle, with reasonable speed, the anticipated increase in the number of applications to be processed. In balancing these multiple factors, we believe that the benefits of implementing an electronic filing system outweigh the associated costs. We invite comment on the feasibility of using a mandatory electronic filing system for new MDS station applications in connection with the application filing procedures discussed above. We also solicit comment on whether ITFS applicants should be required to file applications for new stations electronically on a combined application form, and whether there should be a paper exception for those educators that are not financially supported by a wireless cable operator.

21. ***Electronic Fee Payments.*** Regarding payments of application fees, we will use the current methods of payment for application fees under 47 C.F.R. Section 1.1109. The methods include check, bank draft, money order, wire transfer, electronic customer-initiated payments and Visa or Master Card credit card. The Commission recently amended 47 C.F.R. Sections 1.1108 and 1.1109 to permit the electronic filing of fee payments, initially on an experimental basis. *Implementation of Section 9 of the Communications Act, Report and Order* in MD Docket No. 94-19, FCC No. 94-140 (released June 8, 1994), 59 Fed. Reg. 30,984 (June 16, 1994) at para. 50-51. In addition to the existing payment methods available, we propose to accept electronic payments under Section 1.1109. Pursuant to subsection (a)(1) of that section, procedures for the electronic payment of fees will be announced by Public Notice. We request comment on a fee system where applicants use a unique fee payor number, such as a federal employer identification number together with an appropriate service code, and a suffix in cases where applicants file multiple applications. This would link the fee payment with the electronically filed application. Applicants would be permitted to prepay their application fee after public notice of any national filing window until the close of the filing window, using any currently acceptable form of payment. When the applicant makes the fee payment to the Commission's lockbox bank, the applicant's unique identification number is supplied with the fee payment, and the applicant uses the same number on the electronic application for a new station. We seek comment on this proposal.

22. ***Competitive Bidding Procedures.*** In light of the proposals set forth above, we invite further comment on the *Notice of Proposed Rulemaking* in PP Docket No. 93-253, 8

FCC Rcd 7635 (1993) and the *Second Report and Order*, 9 FCC Rcd 2348, 2359 (1994), *recon. granted in part, Second Memorandum Opinion and Order*, FCC No. 94-215 (released Aug. 15, 1994), 59 Fed. Reg. 44,272 (Aug. 26, 1994), regarding competitive bidding procedures with respect to MDS. Specifically, we invite comment on which of the alternative competitive bidding procedures adopted in the *Second Report and Order* is best suited to MDS.

23. The *Second Report and Order* in the competitive bidding proceeding sets forth three primary auction methods from which the Commission may choose in selecting an appropriate competitive bidding design: (1) simultaneous multiple round auctions; (2) sequential oral auctions (open outcry); or (3) sealed bid auctions (either sequential or simultaneous). 9 FCC Rcd at 2366-67. We seek comment on the suitability of these methods for the auctioning of MDS licenses. There appears to be some geographic interdependence due to coordination of interference at the borders.[18] However, as the value of and interdependence between MDS licenses in different geographic areas may not be sufficiently high to justify the use of simultaneous multiple round bidding, we tentatively conclude that this type of bidding design is less appropriate for MDS than either sequential oral or sealed bid auctions. In commenting on this tentative conclusion, commenters should consider the relative value of MDS licenses, the importance for wireless cable operators of aggregating as many channels as possible within particular geographic areas, and the significance for operators of accumulating channels across diverse geographic areas. We additionally request comment on the relative advantages and disadvantages of utilizing either oral bidding or sealed bidding to auction MDS licenses. In commenting on the suitability of oral or sealed bidding for MDS, commenters should focus their discussion on the following factors: (a) the value and interdependence of MDS licenses; (b) the number of MDS channels that remain available for auction; (c) the expense to the Commission and to bidders; (d) the administrative ease of implementing the auction design selected; and (e) the expected number of bidders for each area. As explained in paragraph 7, *supra*, our preferred approach will utilize predetermined geographic service areas and contemplates auctioning all usable channels in each area together. We seek comment on this approach.

24. Section 309(j) of the Communications Act, which gave the Commission express authority to employ competitive bidding, also mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. Section 309(j)(4)(D). To implement this statutory mandate, the Commission established a menu of preferences, including installment payments, tax certificates, bidding credits and spectrum set-asides, to choose from in selecting preferences that will be applicable to particular services. *Second Report and Order* at 2389-92. We request comment on these various preferences, which entities should be eligible to receive

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[18] Licenses are interdependent when the value of a license to the bidder depends on the degree to which licenses are substitutes or complements. *Second Report and Order* at 2364.

them, and their appropriateness in light of the characteristics of MDS. In particular, with regard to determining eligibility for installment payments, we invite comment on the appropriate definition of "small business" to be employed, taking into account the capital requirements for MDS. Commenters may want to address whether the standard definition of "small business" utilized by the Small Business Administration is appropriate for MDS,[19] or whether we should establish a different standard based on a business' gross revenues.[20] We additionally seek comment on whether spectrum set-asides are appropriate for MDS. We also request comment on how to implement a bidding credit or payment discount program for MDS. In connection with preferences for designated entities, commenters may also wish to address measures designed to prevent unjust enrichment by trafficking licenses acquired through the use of preferences.

25. In addition to commenting on auction methods and preferences, commenters should address other issues related to competitive bidding for MDS. Commenters may want to comment on payment issues, particularly the appropriate amount of the upfront payment submitted prior to an auction, and the amount of the default penalty on winning bidders who fail to make their required down payments on licenses, fail to make final payments for licenses, or are disqualified after the close of an auction. Commenters may also wish to address the advisability of setting a reservation price, below which a license subject to auction will not be awarded. Provisions designed to prohibit collusive conduct in the context of competitive bidding may additionally be addressed, as should any other issues related to competitive bidding for MDS.

IV. PROCEDURAL MATTERS

26. As required by Section 603 of the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.*, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. *See* Appendix B. We request written public comment

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[19] The Small Business Administration standard definition permits an applicant to qualify for financial assistance based on a net worth not in excess of six million dollars with average net income after federal income taxes for the two preceding years not in excess of two million dollars. 13 C.F.R. Section 121.802.

[20] For the broadband and narrowband Personal Communications Services, small businesses are defined as those with average gross revenues for the three preceding years of less than $40 million. It may be that this $40 million gross revenue standard is too high for MDS, given the more modest capital requirements of MDS operators. *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in PP Docket No. 93-253, FCC No. 94-219 (released Aug. 17, 1994), 59 Fed. Reg. 44,058 (Aug. 26, 1994) at para. 46; *Fifth Report and Order* in PP Docket No. 93-253, FCC No. 94-178 (released July 15, 1994), 59 Fed. Reg. 37,566 (July 22, 1994) at para. 13.

on the analysis. Such comments must be filed in accordance with the same filing deadlines as comments filed in this rulemaking proceeding, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of the *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

27. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed under the Commission's rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

28. The collection of information contained in this *Notice of Proposed Rulemaking* will be submitted to the Office of Management and Budget for review under Section 3504(h) of the Paperwork Reduction Act. 44 U.S.C. Section 3504(h). Copies of this submission may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Persons wishing to comment on this collection of information should file their comments with the Federal Communications Commission, Office of Managing Director, Paperwork Reduction Project, Washington, D.C. 20554, and the Office of Management and Budget, Paperwork Reduction Project, Washington, D.C. 20503. This *Notice* proposes further revisions to an existing collection of information, OMB No. 3060-0402, titled "Application for New or Modified Microwave Radio Station License Under Part 21" to create a separate paper application form to be used for new MDS facilities, and an electronic form to be used for new MDS and ITFS facilities. For further information regarding this collection of information, contact William Cline at (202) 418-0210, Records Management Branch, Office of Managing Director.

29. Pursuant to applicable procedures set forth in 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 9, 1995, and reply comments on or before January 24, 1995. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

30. For further information on this proceeding, please contact Sharon Bertelsen at (202) 416-0892 or Jerianne Timmerman at (202) 416-0881, Video Services Division, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Proposed Long-Form MDS Data Elements for Electronic Filing

1. Applicant Name
   Mailing Address
   City, State and Zip Code
   (Area Code) and Telephone Number

2. Fee Payor Identification Number
   Payment Type Code
   Amount Paid

3. Service Area

4. Channel(s) Requested
   Frequency Offset, if Applicable

5. Proposed Transmitting Antenna Location
   City, County, State
   Address of Location
   Latitude and Longitude

6. Antenna Type (omni or directional)
   Antenna Make and Model
   Antenna Beam Tilt
   Antenna Beam Width
   Antenna Polarization
   For Directional Antennas, Antenna Orientation of Main Horizontal Lobe in Degree of Azimuth with Respect to True North
   For Directional Antennas, Tabulation of Horizontal Plane Relative Field Strengths

Antenna Radiation Center Height Above Ground
Overall Antenna Structure Height Above Ground
Height of Structure Only
Equivalent Isotropically Radiated Power (EIRP)
Site Elevation Above Mean Sea Level
Type of Supporting Structure (*e.g.*, building or tower)
Emission Designator

7. Site Availability Certification

8. Certification of Lack of Environmental Impact (or date of environmental assessment filing with FCC)

9. Service of MDS Application and Interference Study on ITFS Station Licensees with Transmitters within Fifty Miles

10. Carrier Status

11. Legal Entity of Applicant, such as Individual, Partnership, Corporation or Association

12. Preference for Designated Entities under 47 C.F.R. Section 1.2110

13. Ownership and Control of Facilities: Owner, Lessee or Other (identification of any real party in interest, including indirect, future and option interests)

14. Ownership in, Control by, Affiliation with or Lease Arrangement with a Cable Television System and Description of Overlap Between MDS Protected Service Area and Cable Franchise Area; All Communication Interests of the Applicant

15. Financial Ability to Construct and Operate for Twelve Months

16. Description of Any FCC Licenses or Permits Revoked or Applications Denied

17. Issues Relating to Character Qualifications, Including Conviction of a Felony

18. Compliance with Alien Ownership Restrictions of 47 C.F.R. Section 21.4

19. Identification of All Parties Involved in Agreements, or Certification that None Exist, Relating to Any Auction or the Bidding Process

20. Certification of Applicant, Includes Drug Certification

APPENDIX B

Initial Regulatory Flexibility Analysis

Pursuant to the requirements of the Regulatory Flexibility Act of 1980, the Commission finds as follows:

Reason for Action: The Commission is initiating this rulemaking to review and streamline the procedures which govern the filing of applications for new MDS facilities.

Objective: The objective of this proceeding is to improve the Commission's application processes for wireless cable and thereby expedite more service to the public.

Legal Basis: Authority for the action proposed in this proceeding may be found in Sections 4(i) and (j), 301, 303(g) and (r), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 301, 303(g), 303(r), 309(j) and 403.

Reporting, Recordkeeping and Other Compliance Requirements: The Commission seeks comment on a number of alternative proposals to streamline the procedures for filing new applications for MDS facilities. Generally, the proposed rule changes would reduce the reporting burden on applicants and impose a few new recordkeeping obligations. There may be an additional cost burden to implement the electronic filing proposal.

Federal Rules that Overlap, Duplicate or Conflict with the Proposed Rules: None.

Description, Potential Impact and Number of Small Entities Affected by the Proposed Rules: The Commission believes that the proposals set forth in this proceeding would affect the estimated 500 existing wireless cable operators, many of which are small entities. Adoption of the proposals would benefit small entities interested in acquiring new MDS stations. The proposals would also provide opportunities for equipment manufacturers and video programming providers, many of which may be small businesses. The cost associated with initiating the electronic filing proposal may affect small entities. We are unable to quantify further the potential impact on small entities, and thus, we invite specific comments on this point by interested parties.

Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The *Notice of Proposed Rulemaking* solicits comment on alternatives.